

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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July 26, 2007

In the Matter of
Marjorie Emery

Docket No. 2007-009
File No. SDA
East Bridgewater

RECOMMENDED FINAL DECISION

This is an appeal of a negative superseding determination of applicability (SDOA) concluding that the subject work, installation of an above ground 30 foot diameter swimming pool and chainlink fence around the pool are not subject to jurisdiction under the Wetlands Protection Act. The petitioner, Marjorie Emery, is an abutter to the proposed work and claims the work will alter a resource area, and a Notice of Intent should be required. More specifically, the petitioner asserts that the project involves placement of fill within Bordering Vegetated Wetland (BVW) and Bordering Land Subject to Flooding (BLSF) both for the installation of a fence and for leveling the ground beneath the pool, and that the project will or has altered the characteristics of the BVW and BLSF through loss of flood storage volume, and possible restriction of flows to increase flood elevations. The issue for adjudication was identified as:

Whether the proposed work -- installation of the 30 foot diameter above ground pool and fencing -- will remove, fill, dredge or alter BVW or BLSF (a resource area).



A simplified hearing was held on May 31, 2007. Prefiled direct testimony was filed by Chris Ross for MassDEP, Sally J. Chancholo, applicant, Marta J. Nover for the Petitioner¹, James F. Noone for the petitioner, Jeffrey D. Youngquist for the petitioner, and John W. Delano for the East Bridgewater Conservation Commission. The live hearing provided opportunity for some limited additional direct testimony and cross-examination.

From the testimony presented I find the following facts.

1. The above ground swimming pool was proposed and has been installed approximately 25 feet from the Chancholos' house. (Request for Determination (RDA) and sketch accompanying RDA; Ross direct testimony ¶ 16).
2. The pool location is within a preexisting established lawn area. (direct testimony and cross examination of Chancholo, Ross direct testimony, ¶ 7, 13, 16) The backyard has been maintained as lawn at least since the time the Chancholos moved into the house in 1999. Chancholo, written direct testimony, live direct testimony and cross-examination.
3. At the far end of the Chancholos' lot – away from the house - there is a stone wall. On the far (west) side of that wall is a wetlands resource area – Bordering Vegetated Wetland. (Nover live direct testimony, Ross direct testimony, ¶7, 9)
4. There is a stream within the BVW on the west side of the stone wall, south of the applicant's property. (Pet. Exhibit 1; Nover live direct testimony; Ross direct testimony, ¶7, 9)
5. There is sparse wetlands vegetation on the east side of the stone wall on the Chancholo lot for a distance of approximately 10 feet from the wall. (Ross direct testimony, ¶ 16, Ross cross examination)

¹ The petitioner presented testimony from three witnesses, Ms. Nover, Mr. Noone and Mr. Youngquist. The latter two were unavailable on May 31st, and were therefore not cross-examined. The other parties waived cross-examination of these two witnesses and I consider their testimony as submitted. Ms. Nover supplemented her prefiled direct testimony (filed as an affidavit in response to an Order for a More Definite Statement) with additional live testimony and then answered questions on cross-examination.

6. From the area of sparse wetlands vegetation near the stone wall to the installed aboveground pool is a distance of approximately 80 feet. Ross direct testimony, ¶ 16.
7. Placement of some leveling fill was proposed to install the pool. (RDA)
8. The topography of the lot is generally flat. From the stone wall at the rear of the backyard to the house (a distance of approximately 166 feet) there is a rise in elevation of 5 feet, constituting approximately a 3% grade. Nover live direct testimony, Pet. Exhibit 1.
9. The applicants have installed the above ground pool, but decided not to install the proposed chainlink fence encircling the pool described in the Request for Determination. Noone testimony, p.1; Youngquist testimony, p.1; Ross testimony, ¶16; Chancholo cross-examination. They have however, installed a stockade fence along the southern boundary of their property. Pet. Exhibit 1; Delano direct testimony and cross-examination.
10. The Chancholo lot is not mapped by the National Flood Insurance Program as floodplain. Ross direct testimony, ¶ 11.

The petitioner has alleged the following impacts from the project on BVW and/or BLSF:

- Removal of 5 – 10 cubic yards of borrow material from digging holes for the stockade fence posts (Opposition, page 1) and placement of this fill material (from fencepost holes) in the BVW (Opposition page 1); Noone direct testimony, p.4; Youngquist direct testimony, p.3. Fill for concrete piers used to install the stockade fence (Opposition page 1);
- Substantial fill (sand) for leveling the area beneath the footprint of the above ground pool (Claim page 2, Opposition page 1; Noone, Nover and Youngquist direct testimony, p.1.);
- Loss of flood storage capacity through above ground pool installation (Claim, page 7);
- Restriction of flows so as to cause an increase in flood stage elevation in BLSF (response to Order for More Definite Statement).

The first issue concerns impacts from the stockade fence installation. The installation of this fence was not included in the Request for Determination, and is not addressed by the SDA issued by MassDEP.

The scope of a request is particularly important because requests for determination are meant to be simple, useful devices that allow a quick determination to be made as to whether the Wetlands Protection Act applies to a given site or proposed work. See 310 CMR 10.05(3)(a)1. ...the scope of a determination is limited by the scope of the request. The requestor is entitled only to an answer only to the question asked.

Matter of Elizabeth Haddad, Requestor, Docket No. 98-028, Final Decision (August 11, 1999).

Because a Determination's scope is limited to the activities or area described in the Request, I conclude that the alleged impacts from the installation of the stockade fence are not within the scope of the Department's SDA.² The three items remaining concern impacts from the pool installation and are considered below.

Much of the petitioner's case concerns the need to determine the precise boundary of BVW and BLSF before a determination as to any effect from the pool installation can be made. The SDA did not make any determination as to any resource area boundary, but concluded that the pool installation would not affect any resource area. The Conservation Commission and the Department concluded however that the BVW edge was somewhere near the stone wall at the far end of the Chancholo property, and the pool location was in the Buffer Zone. Without precisely determining the BVW boundary, the Commission (Mr. Delano) and the Department (Mr. Ross) both testified about potential impacts from the pool installation. They examined the proposed site for the pool, noting the flat topography of the lot and the existing lawn beneath the pool's footprint, and its estimated distance from the BVW.

² A chainlink fence around the pool was described in the RDA, but has since been abandoned by the requestors, and any impacts from its installation will therefore not occur. Instead the stockade fence near the southern property boundary was built.

Mr. Ross concluded that the work was “benign” and “minimally intrusive,” proposed within an existing, maintained lawn area, and would not result in alteration of the BVW approximately 80 feet away.

Petitioner’s exhibit 1, a plan prepared by Outback Engineering dated May 29, 2007, shows a BVW boundary within the Chancholo lot and approximately 25 feet from the stone wall and approximately 80 feet from the nearest edge of the installed pool. The pool is shown (although not located by survey but approximated) within the 100 foot buffer zone of the BVW. Marta Nover testified that the BVW extended “somewhat” into the Chinchillas' backyard. Nover cross-examination. She also acknowledged that she formed her opinions from observations of the Chancholo property from the abutting Emery property, as she was not present at the MassDEP site visit and did not examine the disputed area around the BVW edge near the stone wall in person. Nover cross-examination.

Although the petitioner seeks a definitive boundary for the BVW through this appeal, the petitioner did not present any evidence that the BVW extends into the established lawn as far as the pool location. The plan submitted by the petitioner in fact shows a BVW line 80 feet from the pool, the same distance estimated by Mr. Ross in his direct testimony. I credit the testimony of Mr. Ross and Mr. Delano in their personal examinations of the established lawn and lack of vegetative wetland indicators in the pool area. I also find that the petitioner did not present any independent evidence that the BVW line shown on her own plan (petitioner’s exhibit 1) is incorrect or should be moved over 80 feet towards the house. I therefore find that the pool is located within the established lawn area in a Buffer Zone to BVW and not within a BVW.

As to any effects of the Buffer Zone work on the BVW I conclude that the low and flat topography of the entire lot means that minimal filling and smoothing of the area beneath the

pool was required to create a level surface. Provisions for reviewing activity in the Buffer Zone were recently added to the wetlands regulations at 310 CMR 10.53(1) as a narrative standard.

The regulation emphasizes, “The purpose of preconstruction review of work in the buffer zone is to ensure that adjacent resource areas are not adversely affected during or after completion of the work.” When evaluating proposed work in the Buffer Zone,

The focus should remain squarely on the extent of the work, its proximity to the resource area, and any characteristics of the buffer zone at the site, to avoid adverse effects on the resource area.

Matter of Travis Snell, Docket No. 2005-226, Final Decision May 1, 2007. The work involved has been limited to the placement of leveling fill beneath the pool, at a distance of approximately 80 feet from the BVW, on a site that has a low and flat topography and is vegetated as a maintained lawn. As the petitioner contesting the Department determination, Mrs. Emery bears the burden of presenting with some credible evidence from a competent source that the project will adversely affect the BVW’s ability to serve the interests of the Act. I find the petitioner failed to present evidence of how the leveling fill under the pool in the Buffer Zone would adversely affect the BVW functions and interests of the Act, and further credit the grounds recited by Mr. Ross and Mr. Delano for concluding that no adverse effect would occur.

After concluding the pool’s location is in the Buffer Zone approximately 80 feet away from the BVW, the specific minor activity provision of 310 CMR 10.02(2)(b)1(e) exempting from regulation the described activities not located in resource areas, but in the Buffer Zone, are relevant. That section exempts “conversion of lawn to uses accessory to residential structures such as decks, sheds, patios, and pools, provided the activity is located more than 50 feet away from ... bordering vegetated wetland, ... and erosion and sedimentation controls are implemented during construction.” Id. Although none of the parties raised this regulatory

exemption during the hearing, I find it applies and exempts the proposed pool installation from regulation under the Act since I have concluded the pool is not in BVW, but in the Buffer Zone. I know consider whether it is in another resource area: BLSF.

The petitioner claims the leveling fill might result in loss of flood storage capacity or restriction of flows causing an increase in flood stage elevation, allegations related to the performance standards for work in BLSF at 310 CMR 10.57. These standards are only applicable to the work if the pool is located within BLSF as claimed by the petitioner, which is defined as “an area of low flat topography adjacent to and inundated by flood waters rising from creeks, rivers, streams, ponds or lakes.” 310 CMR 10.57(2)(a). BLSF must border a “waterway or waterbody” 310 CMR 10.57(1)(a)1, and its boundary is the “estimated maximum lateral extent of floodwater which will theoretically result from the statistical 100-year frequency storm.” 310 CMR 10.57 (2)(a)3. The area delineated in the most recent National Flood Insurance Program (NFIP) flood plain data is presumed to be the accurate boundary of BLSF. 310 CMR 10.57(2)(a)3.

Chris Ross submitted a copy of the NFIP data for the area, and explains that he found the nearest mapped floodplain to the 3200 feet from the intersection of Washington and Walnut streets where the Chancholo and Emery properties meet. Ross direct testimony, ¶11. None of the petitioner’s witnesses testified about this data or the mapped floodplain. Mr. Ross also testified that no mapped floodplain exists on the Chancholo lot. Ross direct testimony, ¶11.

I credit Mr. Ross’ testimony concerning the NFIP floodplain maps, presumed to accurately portray the BLSF boundary, showing the nearest floodplain is approximately 3200 feet from the site. The regulations allow for boundaries to be established with direct observations or records of the maximum extent of lateral flooding from a waterbody. 310 CMR

10.57(2)(a)3. The regulations also provide that “in the event of a conflict” engineering calculations may establish the BLSF boundary. Id.

Marta Nover testified about a stream located within the BVW, standing water at the rear of the Chancholo property, and her review of the pictures taken in October 2005 of standing water in rear of the lot. Nover live direct testimony and cross-examination. She did not observe and could not confirm any hydrologic connection between a water body and flooding on the site. The only stream shown west of the Chancholo lot on Petitioner’s Exhibit 1 is drawn to the south of the site. It is west of the Emery lot, which abuts the Chancholo lot to the south and is labeled a “first order intermittent stream”. Petitioner’s Exhibit 1. The testimony of James F. Noone, and Jeffrey D. Youngquist both state a first order intermittent stream exists approximately 350 feet and due west from the Chancholo “SFH” (presumably, meaning single family home). Noone and Youngquist direct testimony, p.3. This location would (with existing scale) be off the edge of the plan submitted as Petitioner’s Exhibit 1, and such a stream is not shown on that plan. The nearest waterbody is therefore either approximately 350 feet from the Chancholo home, or the intermittent stream shown south of the project site. No one testified on behalf of the petitioner that the standing water in rear of the Chancholo lot shown in the October 2005 photographs arose from a bordering waterbody, or that the flooded area included the pool location. I also credit the testimony of Mrs. Chancholo that any flooding on the property has not reached the pool location since its installation. Chancholo cross-examination.

In addition to the absence of a bordering waterbody, I also find that the petitioner did not submit testimony about or contest the mapped floodplain boundary drawn by the NFIP and presumed to be accurate. All three witnesses for the petitioner referred to precipitation data, and the photographs of standing water in the rear of the Chancholo property taken in October 2005.

None of them testified concerning the available NFIP flood data or contradicted Ross' testimony describing the nearest mapped NFIP floodplain location 3200 feet from the site. Neither did they testify to personal observations or records of the extent of flooding from a bordering waterbody, or submit engineering calculations to establish a different BLSF boundary. 310 CMR 10.57(2)(a)3. I therefore find the mapped NFIP data does not include BLSF on the Chancholo lot, and that the pool is not located within BLSF.

At the start of the hearing the petitioner's representative objected to the site visit by MassDEP wetlands analyst Chris Ross on May 22, 2007. At that time the Chancholos and Mr. Ross looked at the site, and the Chancholos provided Mr. Ross with photographs which were then attached to his testimony (Exhibits DEP 1-4). The petitioner objected to the conversation and site visit occurring without his presence, and to both the visit, conversation and the use of the Chancholos' photographs as prohibited ex-parte communications.

The May 22nd site visit was not an ex-parte communication under 310 CMR 1.03(7) as no decision maker for this appeal was present. That rule prohibits a "party or other person directly or indirectly involved in a case from submitting to the Presiding Officer, or any Agency employee involved in the Decision-making process, any evidence, argument analysis or advice ...unless such submission is part of the record of made in the presence of all parties." 310 CMR 1.03(7). Communications between Mr. Ross, who is not the Presiding Officer or involved in the decision-making process for this adjudicatory appeal, and the Chancholos are not covered by this rule. The rule against ex-parte communications does not preclude conversations between some, and not all, parties or sharing information between parties. The photographs given to Mr. Ross by the Chancholos were attached to his prefiled testimony, were authenticated by Mrs. Chancholo during the hearing, and were not ex-parte communications under the rule.

I conclude that the pool is not located in BVW or BLSF, but in the Buffer Zone to the BVW, that petitioner failed to establish any alteration or adverse effect from its installation upon a resource area, and that the exemption from wetland regulation at 310 CMR 10.02(2)(b)(1)e for minor activities in the Buffer Zone applies. Based on these findings, I recommend that the negative superseding determination issued on January 3, 2007 be made final.

NOTICE

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's final decision is subject to the rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion directs otherwise.

*This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
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Ann Lowery
Presiding Officer